

# LEGALFOXES LAW TIMES

## CONSTRUCTION LAW IN INDIA

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### INTRODUCTION:

The construction industry is one of the predominant sectors for the growth of the country. It is one of the booming sectors in India. The Gross Domestic Product contribution of the construction industry was estimated at nearly ₹670,778 crores (US\$ 131 billion) at factor cost in the year 2011-2012<sup>1</sup>. In July of the year 2020, there was an estimation of nearly ₹130,000 crores<sup>2</sup>. Due to the Covid-19 pandemic, there was a decline in this industry. There would be a separate allocation of money for the Infrastructure Projects every year in the Annual Financial Statement. This Construction sector creates a lot of investment opportunities across various related sectors. The construction industry almost creates employment for more than 35 million people in India<sup>3</sup>. It also provides indirect employment. It is a labor-intensive industry that involves multiple parties such as contractors, sub-contractor, employers, labor, supplier, architects, consultants, etc. Any dispute that has arisen in the course of the construction work would affect all these parties badly. It also has an impact on the economy of our country. The construction industry is indispensable for the welfare of our country. However, there is no separate law governing the industry in India.

### **What is Construction?**

<sup>1</sup> [https://en.wikipedia.org/wiki/Construction\\_industry\\_of\\_India](https://en.wikipedia.org/wiki/Construction_industry_of_India)

<sup>2</sup> "Role of Construction Sector for a Growing Economy." *The Financial Express*  
[www.financialexpress.com/economy/role-of-construction-sector-for-a-growing-economy/2128467](http://www.financialexpress.com/economy/role-of-construction-sector-for-a-growing-economy/2128467).

<sup>3</sup> Kanchana S., Siva Prakash P., *A Review on Challenges in Implementation of Total Quality Management in Construction Firms*, *International Journal of Research in Management Sciences*, 2014; 2(2); 47-54.

It is the process of building something large or complicated<sup>4</sup>. It also includes repairs and maintenance work. Construction activity primarily comprises real estate and non-residential construction such as industrial sheds, pre-fabricated buildings. However, it also consists construction of roads, railways, urban infrastructure, ports, highways, bridges, etc. Various processes are involved in construction activities such as planning, financing, and design, etc.

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### Definition of Construction Law

The Law that deals with any legal issues related to the construction activities such as roads, buildings, or any other structures. In India, there is no separate 'Construction Law' to deal with these issues. But an issue can be resolved under various laws of the Land such as Law of Contracts, Alternative Dispute Resolution, Specific Relief Act, etc.

Various issues associated with the construction activities like sudden demand for an increase of wages by laborers, a supply of sub-standard materials by suppliers, property issue, change of plan or design, increase in the amount of work allotted, Issues with subcontractors and suppliers, Non-availability of building materials, etc.

In **State of U.P v. Ram Nath International Construction Pvt Ltd**<sup>5</sup>, the drawings and designs were changed in the middle of the construction work resulted in an increased amount of work. So, the contractor's claim of a higher amount was awarded by the arbitrator. The State whom with the construction contract was entered; argued that the contractor is not entitled to a higher amount according to the terms of the contract and challenged this decision in the court. It was held under the Arbitration Act,1940 that the court cannot interfere in these circumstances and also denied the argument of the state, as there had been a material change of drawings and designs.

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<sup>4</sup> "CONSTRUCTION (Noun) Definition and Synonyms." Macmillan Dictionary, [www.macmillandictionary.com/dictionary/british/construction](http://www.macmillandictionary.com/dictionary/british/construction). Accessed 11 Feb 2021.

<sup>5</sup> AIR 1996 SC 782

In **Tarapore & Co v. State of M.P**<sup>6</sup>, the Supreme Court under the Arbitration Act,1940 held that the escalated rates could be awarded in arbitration even though the contract does not stipulate for such rates.

In **State v. Allied Construction Engineers & Contractors**<sup>7</sup>, the arbitrator had awarded a certain amount of money for de-watering to the contractor under the Arbitration Act,1940, even though the schedule of bids and qualities included the rate of de-watering. This award was set aside by the court stating that an unjustifiable claim of the contractor cannot be entertained by the arbitrator.

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However, all these issues have their origin from the Construction Contract only.

## **CONSTRUCTION CONTRACT:**

### **What is Construction Contract?**

It is an agreement between two parties that sets the scope and terms of a construction project. The two parties involved in the agreement are the Contractor(s) doing the construction work and the Person(s) or Company that hires them to do the work<sup>[8]</sup>. Both the public sector and private sector engaged in construction activities.

According to Article 299 of the Indian Constitution, Government can also enter into a contract. It states as follows:

*(1) All contracts made in the exercise of the executive power of the Union or a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorize.*

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<sup>6</sup> [\(1994\) 3 SCC 521](#)

<sup>7</sup> AIR 1996 All. 295 (DB) at 298, 299

*(2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for this Constitution, or the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.”*

### **Formation of Construction Contract**

Construction Contracts can be formed as per the Indian Contract Act,1872 because there are no specific formalities required for a construction contract. As per section 10 of the Indian contract act, all agreements are contract if it satisfies the following conditions:

- The parties should be competent to contract
- Consent should be free
- Consideration and object should be lawful

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- Should not expressly be declared to be void
- There should be an offer and acceptance

The Construction Contract requires various documents such as<sup>8</sup>

- The Main Agreement
- Specifications
- Drawings
- General conditions
- Special conditions
- Bill of quantity (BOQ)
- Contractor Bid

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<sup>8</sup> [http://www.icaindia.co.in/icanet/quterli/oct-dec2000/ICA\\_oct1.htm](http://www.icaindia.co.in/icanet/quterli/oct-dec2000/ICA_oct1.htm)

- The Letter of Acceptance
- Schedule of Rates
- The Bond

The agreement should contain the following:<sup>9</sup>

- Nature of work
- Time Duration of work
- Parties involved in the construction project
- The cost of labor and materials
- Way of communication between the parties

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<sup>[8]</sup>

<sup>[9]</sup> “What Is a Construction Contract Agreement?” *The Balance Small Business*, 13 Dec. 2020, [www.thebalancesmb.com/contract-agreements-844530](http://www.thebalancesmb.com/contract-agreements-844530).

- Procedure for changing the part of the agreement or scope of the work
- Dispute resolution mechanisms

The general conditions of the construction contract should state the following:

Rights and responsibilities of the owner and contractors;

Payment mode;

The penalty for delay, etc.

Special conditions are the one which required in extraordinary circumstances.

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<sup>9</sup> [http://www.icaindia.co.in/icanet/guterli/oct-dec2000/ICA\\_oct1.htm](http://www.icaindia.co.in/icanet/guterli/oct-dec2000/ICA_oct1.htm)

In **Nabha Power Limited v Punjab State Power Corporation Limited & Another**<sup>10</sup>, the Supreme Court has warned commercial courts from depending on implied terms in the contract in which dispute has arisen from the construction contract. The Supreme Court affirmed the five conditions test laid down in the **BP Refinery (Westernport) Proprietary Ltd v Shire of Hastings**<sup>11</sup> for the interpretation of implied terms are as follows:

- The Implied term must be reasonable and equitable;
- It must be necessary to give business efficacy to the lease;
- It must be an obvious one;
- It must be capable of clear expression;
- It must not contradict any other terms of the contract.

If there is any breach of the construction contract, parties can resolve the issue through the contract act itself by claiming compensation for the breach. Or else they can file a case under the Specific relief act and also can solve the dispute under alternative dispute resolution mechanisms. A separate clause should be dedicated in the agreement stating that a way of resolving the issue.

Under Section 73 and 74 of the Indian Contract Act 1872, an aggrieved party can claim compensation for the breach of the contract.

Section 73 of the Indian Contract Act 1872 states as follows:

*“When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it”.*

Section 74 of the Indian Contract Act 1872 states as follows:

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<sup>10</sup> CIVIL APPEAL No.179 of 2017

<sup>11</sup> (1977) 180 CLR 266

*“When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is provided to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or the case may be, the penalty stipulated for.”*

In **A. T. Brij Paul Singh v. State of Gujarat**<sup>12</sup>, the court while interpreting Section 73 of the contract act, 1872 held that the damages can be claimed by the contractor if it has been proved that the government breached the contract.

### **SPECIFIC RELIEF ACT:**

It is an act through which remedy can be ascertained by the parties of the contract whose civil or contractual rights are violated. The following remedies are available for the parties under the specific relief act, 1963<sup>13</sup>.

- Recovery of possession of the property
- Specific performance of contracts
- Rectification of instruments

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- Cancellation of Instruments
  - Rescission of contracts
  - Declaratory decrees

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<sup>12</sup> [\(1984\) 4 SCC 59](#)

<sup>13</sup> [https://en.wikipedia.org/wiki/Specific\\_Relief\\_Act\\_1963](https://en.wikipedia.org/wiki/Specific_Relief_Act_1963)

- Injunction

The Specific relief act,1963 got amended in the year 2018. The changes made to the act which would be beneficial to the construction sector are as follows<sup>14</sup>

- The new amendment act restricted the civil court from granting an injunction for such infrastructure projects that would delay the project.
- Making specific performance as an available remedy by choice.
- Coming up with a new remedy called the substituted performance of a contract.

Specific performance means instigating a party who breached the contract by not performing what he promised, to perform according to that contract.

Substituted performance means the aggrieved party can avail the performance from the third party rather than pushing the counterparty to perform the same.

### **ALTERNATIVE DISPUTE RESOLUTION MECHANISM:**

Most of the contract would contain the dispute resolution clause. According to that clause only, parties should resolve the disputes. This clause would resolve the issue quickly without court intervention and help us to get a quality outcome. ADR mechanisms have various modes of resolving disputes. They are as follows:

- **Negotiation:** *Consilia Omnia verbis Prius experiri, quam armis sapientem decetis* a famous legal maxim which states that an intelligent man will prefer negotiation before using the arms. In this mode, parties come to a settlement without any third-party intervention.

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<sup>14</sup> Bhadbhade, Nilima. "The Specific Relief (Amendment) Act 2018: A Hurried Legislation." *Bar and Bench - Indian Legal News*, 9 Oct. 2018, [www.barandbench.com/columns/specific-relief-amendment-act-hurried-legislation#:~:text=The%20most%20important%20changes%20in,stop%20progress%20of%20infrastructure%20projects.](http://www.barandbench.com/columns/specific-relief-amendment-act-hurried-legislation#:~:text=The%20most%20important%20changes%20in,stop%20progress%20of%20infrastructure%20projects.)

- **Mediation:** In this mode, a third person would help the parties to come to a settlement. He is called a mediator and should be impartial and independent.
- **Conciliation:** Here, a person called a conciliator would be present. He will assist the parties to conclude.
- **Arbitration:** An Arbitrator will be appointed by the parties to resolve the dispute that arises between them. The decision of an arbitrator is binding on the parties.
- **Med-Arb:** This includes both mediation and arbitration. A third party will act as both the mediator and arbitrator. First, an issue would be resolved in the mode of mediation. Still, if there is an issue that can be settled through arbitration by the same person.
- **Expert determination:** In this mode, if a dispute has arisen it would be submitted in the way of the agreement before one or more experts. He would give the decision which is binding on the parties unless the parties agreed otherwise.
- **Dispute Board:** A board consists of 3 members would regularly visit the construction site. They would recommend settlement if any dispute has arisen in the course of construction.
- The Parties can opt for any of the above-mentioned methods to resolve the dispute by stating it in the agreement. Arbitration became the Common method of resolving an issue of a construction contract. Various amendments have been made to the arbitration and conciliation act also.

### **COMPARISON WITH OTHER COUNTRIES<sup>15</sup>:**

United Kingdom, Singapore, China, and each state of America contains a separate act called Construction Act. As stated earlier, India doesn't have an Act such as that. The Following are

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<sup>15</sup> P Mahtani, Praveen. "Reformation of Construction Law in India." *Legal Era*, 21 Oct. 2020, [www.legaleraonline.com/within-the-circle/reformation-of-construction-law-in-india-671465](http://www.legaleraonline.com/within-the-circle/reformation-of-construction-law-in-india-671465).

some of the provisions that need to be incorporated into our Indian Law concerning construction disputes.

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### **Slip Rule**

The United Kingdom Construction Act contains a provision called slip rule that allows the adjudicator to correct any accidental error or omission within a reasonable time while making the decision.

### **Mistake in Bid**

In the United States, there is a separate provision called a mistake in the bid. That allows the company to withdraw its bid, in case, it has made a bonafide mistake while submission of its bid.

### **Price balancing in Contract**

In the Indian context, the issue of agreement with contractors has front-end loading payment became common. Like middle east countries, we also should have a provision of price balancing in a contract.



### **CONCLUSION:**

Law, in general, was created for governing society. Then why separate law for the governance of each aspect individually? The reason for that is to govern every industry or sector properly and to address their issue in particular. But why no separate law for the governance of the construction industry? The Construction Industry is essential for a developing country. It contributes a lot to the growth of the economy. There are a lot of unaddressed issues in that industry that needs to be resolved. Even though in India, Construction Industry is governed by various laws of our country; a problem in the interpretation of the law, no standard format for construction contract often leads to dispute. The dispute arose in the construction industry not only affects that industry alone but also other industries that have been connected with. Construction Industry Development Council (CIDC) also demanded a unified construction law in 2018 & they also

claimed a separate ministry for a construction sector. So, there is a need for unified construction law for governing and addressing the issue that lies in the industry. Further, it also helps us to solve the dispute quickly. As stated above, provisions from various countries should also be incorporated into the unified law to address some underlying issues. The Proposed unified construction law would help us to eliminate the disputes in the industry. It would thrust the construction industry that ultimately boosts the economy of our country.

